## UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

G+ COMMUNICATIONS, LLC

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG ELECTRONICS AMERICA, INC.;

Defendants.

Case No. 2:22-cv-00078-JRG

JURY TRIAL DEMANDED

SAMSUNG'S SURREPLY TO PLAINTIFF G+ COMMUNICATION LLC'S MOTION TO STRIKE PORTIONS OF THE REBUTTAL EXPERT REPORT OF STEPHEN WICKER (Dkt. 190)

# TABLE OF CONTENTS

DR. WICKER DID NOT ENGAGE IN BELATED CLAIM CONSTRUCTION	1
DR. WICKER'S NON-INFRINGEMENT OPINIONS WERE TIMELY	1
DR. WICKER'S OPINION REGARDING BENEFITS WERE TIMELY	2
DR. WICKER'S OPINION ON PRIOR ART WAS PROPER	3
DR. WICKER'S OPINIONS WERE NOT LEGAL CONCLUSIONS	4
DR. WICKER'S NON-INFRINGING ALTERNATIVES OPINION WAS PROPER	4
	5
	DR. WICKER'S OPINION REGARDING BENEFITS WERE TIMELY DR. WICKER'S OPINION ON PRIOR ART WAS PROPER DR. WICKER'S OPINIONS WERE NOT LEGAL CONCLUSIONS

# **TABLE OF AUTHORITIES**

	Page(s)
Cases	
Baxter Healthcare Corp. v. Spectramed, Inc., 49 F.3d 1575 (Fed. Cir. 1995)	3
Genband US LLC v. Metaswitch Networks Corp., No. 2:14-cv-33-JRG-RSP, 2016 WL 122969 (E.D. Tex. Jan. 9, 2016)	2, 5
Tate Access Floors, Inc. v. Interface Architectural Res., Inc., 279 F.3d 1357 (Fed. Cir. 2002)	3
TQP Dev., LLC v. Merrill Lynch & Co., No. 08-471, 2012 WL 3283354 (E.D. Tex. Aug. 10, 2012)	4, 5

# TABLE OF EXHIBITS

Exhibit No.	Description
11.	Excerpts from GComm's Fourth Supplemental Answer to Samsung's First Set
	of Interrogatories, dated June 28, 2023
12.	Excerpts from the Expert Report of John Kowalski, dated June 28, 2023
13.	Excerpts from the Deposition Transcript of Robert Akl, taken August 10, 2023
14.	Excerpts from the Expert Report of Dr. Robert Akl, dated June 28, 2023
15.	Excerpts from Addendum L from the Expert Report of Dr. Robert Akl, dated
	June 28, 2023
16.	Excerpts from the Rebuttal Expert Report of Prof. Stephen B. Wicker, Ph.D.,
	dated July 19, 2023
17.	Excerpts from Defendants' P.R. 3-3 and 3-4 Invalidity Contentions and Subject
	Matter Eligibility Contentions, dated August 30, 2022

#### I. DR. WICKER DID NOT ENGAGE IN BELATED CLAIM CONSTRUCTION

GComm's assertion that Samsung somehow "hid" the claim interpretation argument at issue here from GComm during fact discovery is nonsensical. Dkt. No. 274 at 1. It was GComm that waited until the end of fact discovery to serve supplemental infringement contentions that completely revised its infringement theories, and the Court allowed this supplementation on the very day Dr. Wicker's rebuttal expert report was due. Dkt. No. 245 at 3-4. GComm chooses to ignore this procedural history in an effort to disallow Samsung's expert even to respond to GComm's new theories. The Court should reject GComm's request based on this fact alone.

GComm's arguments strangely focus on Samsung's reference to ¶ 70 of Dr. Wicker's report, suggesting that Samsung did not address GComm's argument regarding ¶ 71. Dkt. No. 274 at 1. This assertion is baseless. GComm ignores Samsung's rebuttal of GComm's misguided arguments regarding the term "transmission block" in Samsung's reply. *See* Dkt. No. 245 at 1-4 (expressly referencing ¶ 71 of Dr. Wicker's report and addressing GComm's arguments).

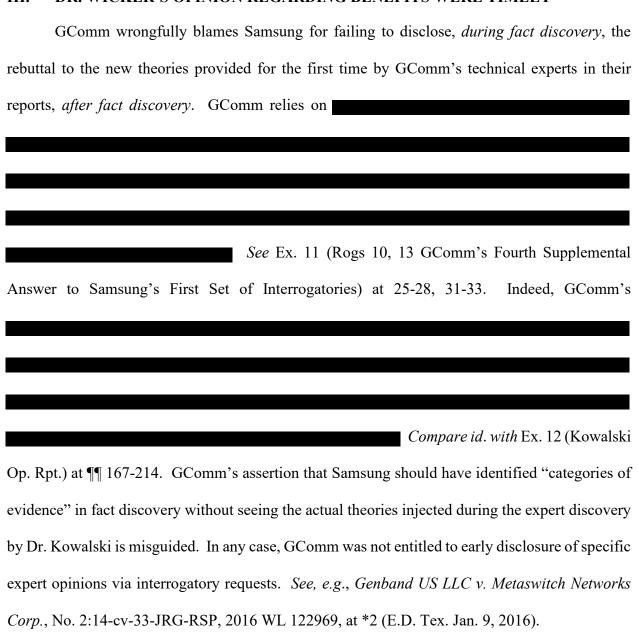
GComm itself engages in claim construction analysis by asserting that Dr. Wicker "violates a basic tenant of claim construction," instead of addressing the case law cited by Samsung demonstrating that disputes between experts over the plain and ordinary meaning of a term are fact issues, and are not a basis for striking the experts' opinions, which is the case here. *Compare* Dkt. No. 274 at 1, *with* Dkt. No. 245 at 2-3. GComm's attempts to strike Dr. Wicker's opinion on the "transmission block" requirement should be denied.

#### II. DR. WICKER'S NON-INFRINGEMENT OPINIONS WERE TIMELY

GComm's complaints about Samsung's June 20 interrogatory response are baseless. Samsung provided this response just days after GComm's June 16 supplemental contentions, which for the first time in this case introduced detailed analysis of 5G technical specifications in

connection with the '881 and '443 patents. GComm moved the Court to supplement its late infringement contentions on June 28, 2023, and they were only allowed by the Court on the very day Dr. Wicker's rebuttal expert report on non-infringement was due, July 19, 2023. Dkt. No. 245 at 2-3. Therefore, Dr. Wicker's rebuttal opinion was timely.

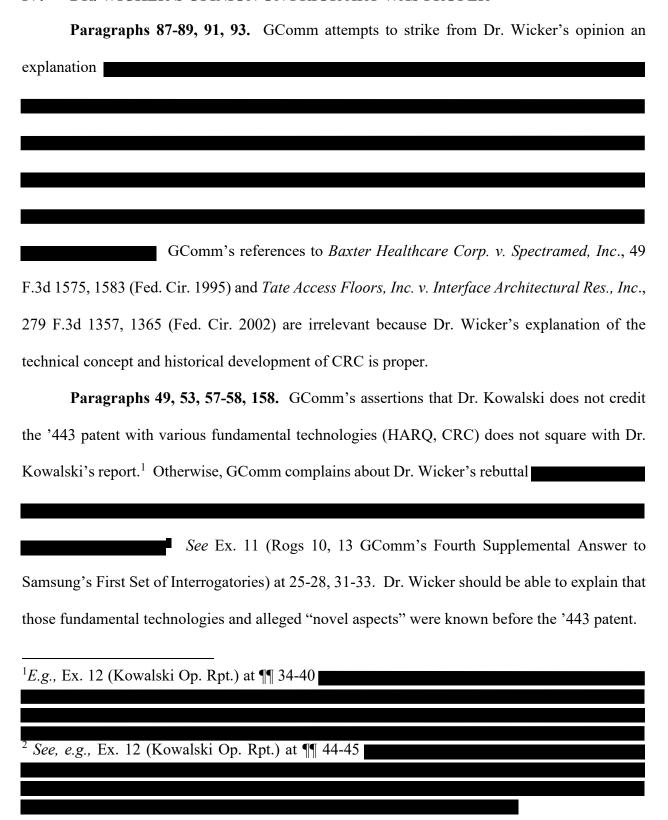
#### III. DR. WICKER'S OPINION REGARDING BENEFITS WERE TIMELY

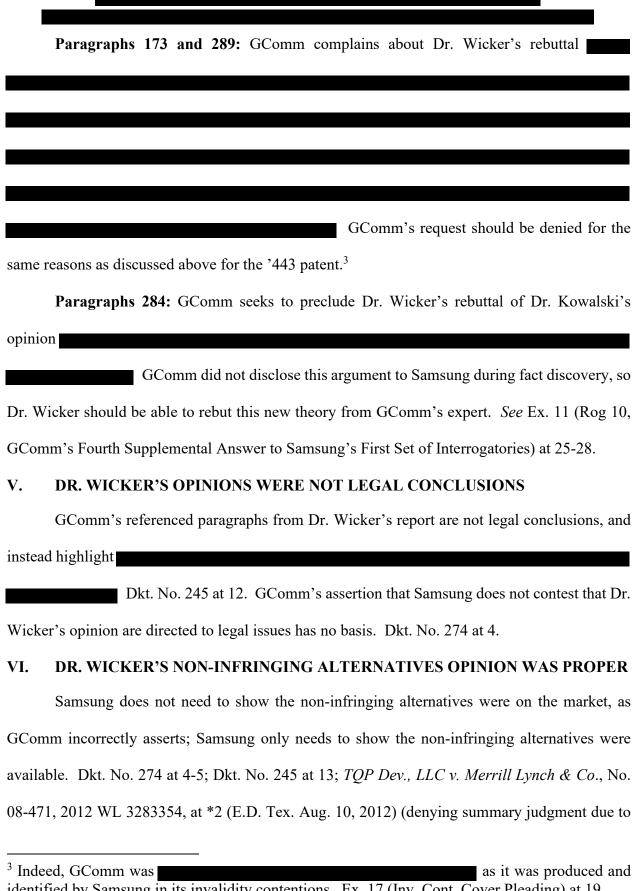


Lastly, GComm's reference to Samsung's counterclaim for GComm's breach of FRAND obligations is misleading. Dkt. No. 245 at 2. Samsung's position is that the patents-in-suit are not

essential to cellular standards, and that Samsung does not infringe them.

#### IV. DR. WICKER'S OPINION ON PRIOR ART WAS PROPER





identified by Samsung in its invalidity contentions. Ex. 17 (Inv. Cont. Cover Pleading) at 19.

material fact issues regarding availability). Realizing that the documents containing non-infringing alternatives are U.S. Patent Application publications, and were available to Samsung before the time of alleged infringement, GComm re-invents its argument in the reply by contending that Samsung never licensed the patents issued from those patent applications. This argument is unavailing. Dr. Wicker

It is undisputed that the disclosures contained in those references were publicly available, including to Samsung. Regardless, the issue whether the non-infringing alternatives were "available" to Samsung given the technology's conventionality in the field is a factual inquiry for the jury. See TQP Dev., 2012 WL 3283354, at \*2.4

# VII. DR. WICKER'S OPINION ON THE PROPER WAS

GComm does not dispute that the was timely produced during fact discovery, over a month before fact discovery closed and expert reports were due. GComm also does not dispute that Samsung discussed in interrogatory responses. GComm's complaint that Samsung did not cite the by name in interrogatory responses is unavailing, because it was not entitled to receive an expert opinion at that time. See, e.g., Genband, 2016 WL 122969, at \*2. GComm's reference to ContentGuard Holdings, Inc. v. Apple, Inc. is also inapposite. 2-13-cv-01112, Dkt. 820 at 3 (Aug. 3, 2015, EDTX) (C.J. Gilstrap). There, this Court denied leave to amend invalidity contentions to add a prior art system used by the defendant as a non-infringing alternative. Id. at 1-3. Here, Samsung timely produced the , and its interrogatory response put GComm on notice that licenses "will be further addressed in an expert report." Dkt. No. 190-8 at 14.

Ex. 16 (Wicker Reb. Rpt.) at ¶¶ 173, 284.

<sup>&</sup>lt;sup>4</sup> Lastly, GComm's request to strike Dr. Wicker's reference

Dated: September 5, 2023

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was filed electronically in compliance with Local Rule CV-5 on September 5, 2023. As of this date, all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3)(A) and by email.

/s/ Ralph A. Phillips